313 U.S. 590

MAY 2 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 1014

VALLEY MOULD AND IRON CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS.

INDEX.

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Questions Presented 2

Statement 5

Procedural Facts 5

The 1937 Representation Case..... 5

The Complaint Case..... 6

Proceedings in the Circuit Court of Appeals.. 7

Evidential Facts and Holdings of the Court Below.... 8

Reasons for Granting the Writ..... 12

I. The decision of the court below that an employer must accord to an agent, certified by the Board under section 9 (b) of the Act, recognition as the proper bargaining agent until the certification is rescinded or succeeded by another certification by the Board, regardless of the expressed wishes of his employees, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in National Labor Relations Board v. Remington Rand, Inc., et al., 94 F. (2d) 862, 869, and with the decision of the Circuit Court of Appeals for the Fifth Circuit in National Labor Relations Board v. Whittier Mills Co., et al., 111 F. (2d) 474, 478 12

II. The court below erroneously decided an important question of federal law, relating to the construction and application of a federal statute, which has not been, but should be settled by this Court, when it held that because Congress conferred on the Board exclusive authority to determine the collective bargaining Unit it thereby conferred on the Board exclusive authority to determine the collective bargaining Agent 14

III. The decision of the court below, which upholds the Board's finding that petitioner dominated or interfered with the formation or administration of the Independent and contributed financial or other support to it, upon the ground that certain statements made by petitioner's vice president were "of such character as to take from his employees their untrammeled freedom of action in selecting their bargaining agents" is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in Humble Oil & Refining Co. v. National Labor Relations Board, 113 F. (2d) 85.. 16

IV. The court below erroneously decided an important question of federal law relating to the construction and application of the federal statute which has not been but should be settled by this Court when it upheld and enforced the order of the Board which interfered with the orderly operation of petitioner's plant to the extent of requiring petitioner to give Joe Cook, one of petitioner's employees, his day off on Sundays..... 19

Conclusion 20

Appendix 21

Applicable Provisions of the National Labor Relations Act. (Title 29, U. S. C. A. Section 151, et seq.; c. 372, Sec. 1, 49 Stat. 449, et seq.)..... 21

TABLE OF AUTHORITIES.

Cases.

Humble Oil & Refining Co. v. National Labor Relations Board, 113 F. (2d) 85.....16, 17

International Association of Machinists; Tool and Die Makers Lodge No. 35, etc. v. National Labor Relations Board, 311 U. S. 72.....3, 13

Link-Belt Co. v. National Labor Relations Board, 110 F. (2d) 506..... 18

National Labor Relations Board v. Boss Mfg. Co., 107 F. (2d) 574..... 19

National Labor Relations Board v. J. Greenebaum Tanning Co., 110 F. (2d) 984..... 19

National Labor Relations Board v. Jones & Laughlin, 301 U. S. 1.....8, 19

National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc., 303 U. S. 261..... 18

National Labor Relations Board v. Remington Rand, Inc., et al., 94 F. (2d) 862.....12, 13

National Labor Relations Board v. Sterling Electric Motors, Inc., 109 F. (2d) 194..... 18

National Labor Relations Board v. Union Pacific Stages, Inc., 99 F. (2d) 153..... 19

National Labor Relations Board v. Whittier Mills Co., et al., 111 F. (2d) 474.....12, 13

Valley Mould and Iron Corporation v. National Labor Relations Board, 116 F. (2d) 760..... 1

Matter of Valley Mould and Iron Corporation and Lodge 1029, etc., 5 N. L. R. B. 95; 6 N. L. R. B. 133... 5

STATUTES.

Judicial Code, Section 240(a), 28 U. S. C. A. 347..... 2
National Labor Relations Act (29 U. S. C. A. Sec. 150, et seq.):
Section 7 .....3, 6, 7, 21
Section 8 (1) 6, 21
Section 8 (2) 6, 21
Section 8 (3) 21
Section 8 (5) 14, 15, 21
Section 9 (a) 2, 14, 15, 21
Section 9 (b) 12, 14, 22
Section 9 (c) 14, 15, 22
Section 10 (e) 2
Section 10 (f) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.

VALLEY MOULD AND IRON CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

VALLEY MOULD AND IRON CORPORATION prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Seventh Circuit, entered on February 5, 1941, granting the petition of the respondent, National Labor Relations Board (herein called the "Board"), for the enforcement of its order against petitioner, Valley Mould and Iron Corporation.

Opinions Below.

The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 734-778)* are reported in 20 N. L. R. B. No. 18. The opinion of the Circuit Court of Appeals (R. II, 23-36) is reported in *Valley Mould and Iron Corporation* v. *National Labor Relations Board*, 116 F. (2d) 760.

---

* References designated R. I and R. II are to the indicated pages of the first and second volumes, respectively, of the record before this court.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered February 5, 1941 (R. II, 68-70). The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Title 28 U. S. C. A., section 347, and section 10 (e) and (f) of the National Labor Relations Act, Title 29 U. S. C. A., section 150 (herein called the "Act").

Statutes Involved.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. A., Supp. 5, secs. 151, *et seq.*) are set forth in the appendix to this petition, *infra,* pages 21-22.

Questions Presented.

1. Whether an employer must refuse to bargain collectively with a labor organization proven to have been selected as a bargaining representative by a majority of his employees in an appropriate unit, in a case where the Board, as of a date over one year previously, had certified another labor organization as such representative.

2. Whether an employer refused to bargain collectively with the representative of his employees, subject to the provisions of section 9 (a) of the Act, where on August 19, 1938, he advised such representative that he could no longer bargain with it as the exclusive representative of his employees within the appropriate unit, inasmuch as although such representative had been certified by the Board as of May 31, 1937, a majority of his employees thereafter, on July 1, 1938 had selected a new and different representative and had submitted unimpeached written proof of that fact to the employer which he thereafter

verified in conjunction with one of the Board's Field Examiners.

3. Whether the court below erred in holding that the rule laid down by this Court in *International Association of Machinists; Tool and Die Makers Lodge No. 35, etc.* v. *National Labor Relations Board,* 311 U. S. 72, requires that petitioner bargain collectively only with a representative* certified by the Board as of May 31, 1937, within the appropriate unit, notwithstanding that petitioner had received formal notice and conclusive proof that another labor organization** on July 1, 1938, had been designated as representative for the purposes of collective bargaining by a majority of petitioner's employees within such unit.

4. Whether evidence of certain oral statements, held by the Board and the court below to constitute interference with petitioner's employees in the exercise of the rights guaranteed in section 7 of the Act, constitutes evidence to support a finding that the employer thereby dominated or interfered with the formation or administration of a labor organization of his employees or contributed financial or other support to it.

5. Whether, with respect to the organization of the Independent between June 1 and June 16, 1937, certain statements made by Swab, petitioner's vice president, in the presence of five employees at the final meeting of petitioner's Employees Representation Plan representatives on April 16, 1937, were "of such character as to take from his employees their untrammeled freedom of action in selecting their bargaining agents," as held by the court below (R. II, 33).

---

* Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge No. 1029 (hereinafter referred to as the "Amalgamated".)

** Valley Mould Independent Employees' Union, South Chicago Works (hereinafter referred to as the "Independent".)

6. Whether the court below erred in holding that the finding of the Board that petitioner dominated and interfered with the formation and administration of the Independent was supported by substantial evidence.

7. Whether upon the evidence and findings, the Board was warranted in making its order requiring petitioner to withdraw recognition from and completely disestablish the Independent as the representative of any of its employees for the purpose of dealing with petitioner concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment.

8. Whether the Board is authorized to make, and in the case at bar was justified in making, an order interfering with the orderly operation of the employer's plant, to the extent of requiring petitioner to give a certain named employee his day off on Sundays.

STATEMENT.

The petitioner is engaged in the production, sale, and distribution of pig iron, ingots, moulds and stools at its plants in Hubbard, Ohio, and Chicago, Illinois. The Board proceeding here involved relates only to petitioner's plant located in Chicago, Illinois, normally employing approximately 220 employees (R. I, 361). Petitioner, in this proceeding, seeks review of an order of the Seventh Circuit Court of Appeals enforcing, with a slight modification, an order of the National Labor Relations Board, the details of which are discussed hereinafter. Briefly stated, the facts are as follows:

PROCEDURAL FACTS.

The 1937 Representation Case. On June 18, 1937, the Amalgamated filed with the Board a petition for investigation and certification of collective bargaining representatives naming the Independent as another labor organization claiming to represent employees directly affected by the investigation. A hearing was held on January 6, 1938, and pursuant thereto an election was held on February 18, 1938, at which of 204 valid ballots cast 103 were in favor of the Amalgamated and 97 in favor of the Independent (R. I, 155). Under date of March 23, 1938, the Board certified the Amalgamated as the sole collective bargaining agency within the appropriate unit, viz.: the hourly paid and piece-work production and maintenance employees of petitioner at its Chicago, Illinois, plant, excluding clerical and supervisory employees (R. I, 751-752). While this certification was dated March 23, 1938, it was made as of May 31, 1937 (R. I, 595-596).*

* See *Matter of Valley Mould and Iron Corporation and Lodge 1029 etc.*, 5 N. L. R. B. 95 at pages 95 and 98; 6 N. L. R. B. 133 at page 134.

The Complaint Case. Based upon charges and amended charges filed on June 22, November 12 and December 1, 1938, and January 23, 1939 (R. I, 605, 607, 609, 611), the Board on January 23, 1939, issued its complaint (R. I, 600) alleging that petitioner had refused to bargain collectively with the Amalgamated, and that on or about May 10, 1937, petitioner "did instigate the formation of a labor organization among its employees, known as Valley Mould Independent Employees Union, South Chicago Works and * * * did advise, urge and warn its employees to join * * * did dominate, and interfere with the administration of * * * did contribute financial and other support to * * * and did otherwise foster, promote and encourage the formation and growth of" the Independent, thereby engaging in unfair labor practices within the meaning of section 8 (2) of the Act. The complaint likewise alleged in general terms that petitioner did interfere with, restrain and coerce its employees in the rights guaranteed in section 7 of the Act, thereby engaging in unfair labor practices within the meaning of section 8 (1) of the Act. The answer of petitioner denied the allegations of the complaint and prayed its dismissal.

A hearing was had on May 1, 2, and 3, 1939. On June 9, 1939, the Trial Examiner's intermediate report was filed (R. I, 626) and following exceptions, brief and oral argument the Board issued its decision and order on February 5, 1940 (R. I, 734).

The Board's order (R. I, 776-778) requires the petitioner to cease and desist from refusing to bargain collectively with the Amalgamated, dominating or interfering with the administration of or contributing support to the Independent or any other organization of its employees at its Chicago, Illinois plant, recognizing the Independent as the representative of any of its employees for the purpose

of dealing with petitioner concerning grievances, labor disputes, wages, rates of pay, hours of labor or other conditions of work, and in any other manner interfering with, restraining or coercing its employees at its Chicago, Illinois plant in the exercise of their rights as guaranteed in section 7 of the Act.

In addition the petitioner is required to take the following affirmative action: Upon request bargain collectively with the Amalgamated as the exclusive representative of its employees within the above described appropriate unit in respect to rates of pay, wages, hours of employment and other conditions of employment, withdraw all recognition from and completely disestablish the Independent as the representative of any of its employees for the purpose of dealing with petitioner concerning these matters, restore Joe Cook to his former privilege of taking his regular day off on Sunday, post notices conformably to the order, and notify the Board's Regional Director as to the steps taken to comply therewith.

Proceedings in the Circuit Court of Appeals. On December 17, 1940 the court below, upon review, rendered its opinion holding that subject to certain reservations concerning the right of parties to seek a recertification and redetermination of the bargaining agent the order of the Board must be enforced (R. II, 23-36).

EVIDENTIAL FACTS AND HOLDINGS OF THE COURT BELOW.

Organization of petitioner's employees by the Amalgamated commenced in July, 1936 (R. I, 739). On April 16, 1937 the petitioner called a meeting of the representatives who functioned under an employees' representation plan which had been in effect in petitioner's Chicago plant since June, 1933 and advised them that because of the decision of this Court in *National Labor Relations Board* v. *Jones & Laughlin,* 301 U. S. 1, the plan must be discontinued. The evidence of witnesses for the Board and for respondent shows that the following further remarks were made by respondent's vice-president Swab in this connection in the course of such meeting:

> "* * * we can't meet with you fellows any more as a management group. I don't see why that you fellows can't meet with your own little organization as you are * * *. From time to time the employees have been overzealous and must learn to keep their feet on the ground. Violence, coercion or intimidation by employees just bring ill feeling between the employee and the employer. There is no reason for this to prevail. We have always felt friendly to our men and have been lenient to our men—more so than some other nearby plants. What you gain by force you usually lose but (it is better) to practice the Golden Rule. Rumors and complaints come into the office concerning accusations regarding other men in the plant. This may become worse. We all are here for the same purpose, we are all here to get a living, we are all here to serve our customers. Such conditions will arise but they should be treated in an orderly manner. It is entirely the choice of the men in the plant whether they will be represented by someone in the plant or an outsider. How you will best be served and under what system you end rests with you. We will judge the future by the past and hope the future will be the same as the past." (R. I, 121, 551-552, 291-292).

The question having arisen as to the employees' representation plan, Swab likewise stated he couldn't see, it didn't make sense to him why men should want to pay, have to pay dues to work, for the right to work, and why we should have outsiders coming in telling us what to do (R. I, 121-122).

On May 4, May 18, and May 21, 1937, pursuant to request of the Amalgamated, petitioner met with representatives of that organization in regard to their request for recognition and bargaining (R. I, 130, 294-298). No agreement was reached and on May 30, 1937 a strike was instituted by the Amalgamated which continued until July 9, 1937 (R. I, 132, 298-300).

Between June 1 and June 16, 1937, the Independent was organized (R. I, 436-441, 443-445, 453-454). The circumstances of such organization were summarized as follows by the court below:

> "It appears without dispute that certain employees of petitioner, without suggestion upon the part of petitioner, consulted an attorney in no wise connected with petitioner, had prepared a constitution and by-laws for the Independent and secured a corporate charter therefor. There is no evidence in the record indicating that this action was at the suggestion of petitioner or any of its representatives." (R. II, 32-33).

On July 9, 1937, the strike was settled in the course of a conference between representatives of Amalgamated and petitioner, as a part of which settlement petitioner issued a statement of its labor policy, agreed upon by Amalgamated, recognizing the Amalgamated as the representative of its members (R. I, 132-135, 306-307, 510-512).

Following the 1937 representation case, above described, and between April 22 and July 1, 1938, the company held six meetings with the duly authorized representatives of the Amalgamated for the purpose of collective bargain-

ing, in the course of which, as stated by the court below (R. II, 30), proposals and counter proposals were made, but no final agreement was consummated. On June 15, 1938, the Independent advised petitioner that it represented considerably more than a majority of the employees and requested petitioner to recognize the Independent as the authorized collective bargaining agency. On July 1, 1938, the Independent presented to petitioner a petition signed by 146 employees requesting that petitioner recognize the Independent as the sole bargaining agency. Thereafter a representative of petitioner and Mr. Ryder, Field Examiner of the Board, checked the authenticity of the signatures on the petition presented by the Independent by comparing the signatures on the petition with signatures appearing on petitioner's employment records. It was determined that the petition had been signed by 143, or considerably in excess of a majority, of petitioner's employees, which at that time numbered between 200 and 220 (R. I, 331-335, 361, 556-564).

At the seventh and final meeting with the Amalgamated, held on August 19, 1938, petitioner stated to the representatives present that the Field Examiner of the Board had checked the validity of the signatures on the petition of the Independent, which check disclosed that the petition carried valid signatures of more than a majority of the company's employees, and that, because of the question as to representation which had arisen, the petitioner was meeting with the committee of the Amalgamated as representative of its members only. The committee rejected petitioner's suggestion that the negotiations should be limited accordingly, and retired from the meeting (R. I, 587).

No further meetings were requested by the Amalgamated and the Board's complaint against petitioner was issued on January 23, 1939 as above set forth.

On December 17, 1940, the court below rendered its opin-

ion, in which it upheld the Board's finding as to the alleged failure to bargain, solely for the reason that on August 19, 1938, the petitioner, after verifying the validity of the signatures appearing on the petition of the Independent, had advised the Amalgamated that the Independent had submitted proof of its majority representation and that as a result petitioner could not continue to bargain exclusively with the Amalgamated. The reasoning of the court below appears in the following excerpt from its opinion (R. II, 30-31):

> "* * * As we read the statute, in the Board is lodged jurisdiction to determine in a proper manner the unit appropriate for the purpose of collective bargaining. Congress conferred exclusive jurisdiction upon the Board to determine the appropriate and selective bargaining unit for employees and gave to it alone proper machinery by way of election for making such determination. Employees have the right to designate their bargaining agent. The Board alone may certify the selection and we take it that so long as that certification remains in full force and effect, the organization designated must be recognized. The employer must accord to a certified agent recognition as the proper bargaining agent until the certification is rescinded or succeeded by another."

REASONS FOR GRANTING THE WRIT.

I.

The decision of the court below that an employer must accord to an agent, certified by the Board under section 9 (b) of the Act, recognition as the proper bargaining agent until the certification is rescinded or succeeded by another certification by the Board, regardless of the expressed wishes of his employees, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in National Labor Relations Board v. Remington Rand, Inc., et al., 94 F. (2d) 862, 869, and with the decision of the Circuit Court of Appeals for the Fifth Circuit in National Labor Relations Board v. Whittier Mills Co., et al., 111 F. (2d) 474, 478.

The facts which form the basis of the decision of the court below on this phase of the case, and the reasoning of the court relating thereto, are set forth at pages 9 to 11, *supra*. From this it appears that the court below has squarely held that the employer must ignore the plain and uncontroverted command of a substantial majority of his employees, and relegate them to representation by a bargaining agent which they no longer desire for a period which might be, as in the case at bar, as long as nine months.*

Thus the decision of the court below comes in direct conflict with that of the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Remington Rand, Inc., et al.*, 94 F. (2d) 862, and with that of the Circuit Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *Whittier Mills Co., et al.*, 111 F.

* The petition for investigation and certification of representatives was filed by the Amalgamated June 18, 1937. The Board's decision and certification pursuant thereto was issued March 23, 1938.

(2d) 474, in both of which the courts held that the effect of a certification by the Board of the proper bargaining agent constitutes only a determination of an existing status of majority representation. Such determination creates a presumption, but *only* a presumption, that the status continues, and these courts have plainly stated that such presumption falls when it is shown that the status no longer exists. In such case, under the rule of these decisions, if a bargaining agent, certified by the Board, no longer represents a majority of the employees, the employer is necessarily required to withdraw exclusive recognition from that agent as the bargaining representative.

As stated by the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board* v. *Remington Rand, Inc., et al.*, 94 F. (2d) 862, 869:*

> "The membership of a union is constantly changing, and it may at any time cease to represent the majority; *if it does, it loses its power to bargain for the unit.*"

The same rule is stated by the Circuit Court of Appeals for the Fifth Circuit in *National Labor Relations Board* v. *Whittier Mills Co., et al.*, 111 F. (2d) 474, 478, where the court said:

> "The statute does not say how long a certificate of representation shall stand good. It is not intended to be ephemeral, nor should it be perpetual. On general principle, since it ascertains the status as existing, the presumption is that the status continues *until shown to have ceased.*"

The only limitation placed upon this proposition is that laid down by this Court in *International Association of Machinists; Tool and Die Makers Lodge No. 35, etc.* v. *National Labor Relations Board*, 311 U. S. 72, which prohibits the employer from impeaching the existence of a proven majority by "a mere *ex parte* and self-serving assertion that a shift has occurred."

In the case at bar there is no reliance upon, or evidence of any such *ex parte* or self-serving assertion that a

* Unless otherwise stated, the emphasis indicated is our own throughout.

shift has occurred. The certificate of the Board determined that a certain status existed on May 31, 1937. The record stands without dispute that the status so found to have existed was thereafter conclusively shown to have ceased on July 1, 1938, when 143 of petitioner's 220 employees unequivocally signified their desire to be represented by the Independent.

II.

The court below erroneously decided an important question of federal law, relating to the construction and application of a federal statute, which has not been, but should be settled by this Court, when it held that because Congress conferred on the Board exclusive authority to determine the collective bargaining UNIT it thereby conferred on the Board exclusive authority to determine the collective bargaining AGENT.

The language of the court below, quoted at page 11, *supra,* discloses that the court confused the mandatory requirement of subsection (b) of section 9 with the permissive language of subsection (c) of that section, and that as a result of such confusion the court has erroneously failed to give effect to the equally mandatory requirements of section 8 (5) and of section 9 (a) of the Act.

The following language of the court below is an accurate statement of the effect of subsection (b) of section 9:

> "As we read the statute, in the Board is lodged jurisdiction to determine in a proper manner the unit appropriate for the purpose of collective bargaining. Congress conferred exclusive jurisdiction upon the Board to determine the appropriate and selective bargaining unit for employees * * *."

The following further language of the court below, however, which apparently has reference to the provisions of

subsection (c) of section 9 is an erroneous statement of the intent of Congress as expressed in the statute:

> "Employees have the right to designate their bargaining agent. The Board alone may certify the selection and we take it that so long as that certification remains in full force and effect, the organization designated must be recognized. The employer must accord to a certified agent recognition as the proper bargaining agent until the certification is rescinded or succeeded by another."

No such result can be drawn from the language of subsection (c). On the contrary, section 9 (a) of the Act provides that "representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." Section 8 (5) of the Act provides that it is an unfair labor practice to refuse to bargain collectively with the representatives of the employees, "subject to the provisions of section 9 (a)." The whole intent of the statute is to require petitioner and other employers to bargain collectively with the representatives of the employees who, at the time of the bargaining negotiations, actually and *in fact* represent a majority of such employees. There are no limitations upon the requirement to bargain with the majority representative. None can be read into the statute.

III.

The decision of the court below, which upholds the Board's finding that petitioner dominated or interfered with the formation or administration of the Independent and contributed financial or other support to it, upon the ground that certain statements made by petitioner's vice president were "of such character as to take from his employees their untrammeled freedom of action in selecting their bargaining agents" is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in Humble Oil & Refining Co. v. National Labor Relations Board, 113 F. (2d) 85.

As pointed out above, *supra*, pp. 8-9, at a meeting on April 16, 1937, petitioner's vice president Swab made certain statements which according to the holdings of the court below were "of such character as to take from his employees their untrammeled freedom of action in selecting their bargaining agents."

The court below further held as follows in this connection (R. II, 34):

> "There was testimony in addition that in February, 1938, a foreman said to one witness, just before the election 'don't vote for the C. I. O.,—vote for the company.' The Board relates certain other testimony upon which it relied, as a result of all of which it concluded that petitioner had dominated and interfered with the formation and administration of and contributed support to the Independent and thereby interfered with, restrained and coerced its employees. The evidence in support of this finding is weak. There is much persuasive evidence that petitioner, so far as its executive officers were concerned, attempted to preserve the neutrality fostered by the act."

The "other testimony" referred to as having been relied upon by the Board is summarized in the Board's decision and order (R. I. 769-772).

Assuming arguendo that there may be sufficient evidence in the record to support a finding that petitioner interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in section 7 of the Act, the decision of the court below, in holding such evidence sufficient to support a further finding that petitioner dominated the formation or administration of the Independent Union stands in direct conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit, in *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. (2d) 85. In that case the court said on pages 87 and 88:

> "But the choice of the majority must be a free choice as respects the employer. Section 8, 29 U. S. C. A. § 158, states things he may not do, and Section 10 gives the Board power to order him to cease and desist. Among other things, the employer may not 'interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 (157).' He may not 'dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.' The first-quoted words refer especially to individual employees, though they may apply also to organizations. The last-quoted words refer only to labor organizations and are the presently important ones. 'Dominate' is a strong word, meaning to master, to rule, to control. 'Interfere with' is a weaker and more extensive term, and may include any substantial intermeddling. It is fairly intended that an employer shall take no part in the original formation of a labor organization, or in the subsequent administration of its affairs, either by opposition or by any kind of support. If he does, a cease-and-desist order may be issued, and in some cases the Board may, as has been held, disestablish the organization. * * * If employer interference has been slight, and not coercive or oppressive, suppression of a majority organization whose members are not complaining of interference would be an extreme step. If the Board should order it under Section 10(c) as 'affirmative action which will effectuate the

> policies of this Act', it may be a question whether the court should hold such action not calculated to effectuate the act's true policies."

This distinction is also pointed out in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270; *Link-Belt Co.* v. *National Labor Relations Board*, 110 F. (2d) 506, 513-517 (dissent) (C. C. A. 7); and *National Labor Relations Board* v. *Sterling Electric Motors Inc.*, 109 F (2d) 194, 210-212 (dissent) (C. C. A. 9).

In view of the foregoing considerations and upon the evidence and findings referred to the Board was not warranted in making an order of such drastic character as the order requiring petitioner to withdraw recognition from and completely disestablish the Independent as the representative of any of its employees for the purpose of dealing with petitioner. Such order falls within the intendment of the following language of this Court, in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., et al.*, 303 U. S. 261, 270:

> "We may assume that there are situations in which the Board would not be warranted in concluding that there was any occasion for withdrawal of employer recognition of an existing union * * *, even though it had ordered the employer to cease unfair labor practices."

IV.

The court below erroneously decided an important question of federal law relating to the construction and application of the federal statute which has not been but should be settled by this Court when it upheld and enforced the order of the Board which interfered with the orderly operation of petitioner's plant to the extent of requiring petitioner to give Joe Cook, one of petitioner's employees, his day off on Sundays.

By its order restoring to Joe Cook his regular day off on Sunday, the Board has assumed managerial authority over the petitioner's operating practices and has foreclosed any change, irrespective of working conditions and plant efficiency, in regard to such day off. The Act does not empower the Board to assume these rights of management. In this regard the authority granted to the Board to "effectuate the policies of the Act" is not unlimited. *National Labor Relations Board* v. *Boss Mfg. Co.*, 107 F. (2d) 574, 579 (C. C. A. 7); *National Labor Relations Board* v. *J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 988 (C. C. A. 7). Thus in *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153 (C. C. A. 9), the court said (p. 177):

> "The National Labor Relations Act was not intended to empower the Board to substitute its judgment for that of the employer in the conduct of his business. It did not deprive the employer of the right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation. *It did not authorize the Board to absolve employees from compliance with reasonable rules and regulations for their government and guidance. The Act does not vest in the Board managerial authority. National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893, 108 A. L. R. 1352."

Conclusion.

Wherefore it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Seventh Circuit should be granted.

ERNEST S. BALLARD,
MERRILL SHEPARD,
HENRY M. THULLEN,
Attorneys for Petitioner, Valley Mould and Iron Corporation.

APPENDIX.

Applicable Provisions of the National Labor Relations Act.

(Title 29, U. S. C. A. Section 151, et seq.; c. 372, Sec. 1, 49 Stat. 449, et seq.)

"RIGHTS OF EMPLOYEES.

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

"(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a)."

"REPRESENTATIVES AND ELECTIONS.

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes,

shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

"(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

* * * * *

Statute: Page

National Labor Relations Act, Act of July 5, 1935, c. 372, 49 Stat. 449 (29 U. S. C., Supp. V. Sec. 151, *et seq.*):

Sec. 7 6
Sec. 8 (1) 6, 7, 11
Sec. 8 (2) 7
Sec. 8 (5) 7

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 1014

VALLEY MOULD AND IRON CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. II, 23–36) is reported in 116 F. (2d) 760. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. I, 734–778) are reported in 20 N. L. R. B., No. 18.

JURISDICTION

The decree of the court below (R. II, 68–70) was entered on February 5, 1941. The petition for a writ of certiorari was filed on May 2, 1941. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether an employer may refuse to bargain collectively with a labor organization, duly certified by the Board in prior proceedings as the exclusive bargaining representative of the employees, upon the pretext that another labor organization has subsequently obtained a majority of the employees, where the Board's findings establish that the second labor organization is dominated by the employer.

2. Whether there was substantial evidence to support the Board's findings that petitioner dominated, interfered with, and supported the second labor organization in violation of Section 8 (1) and (2) of the Act.

3. Whether, in the circumstances of this case, the Board properly required petitioner to withdraw all recognition from and completely disestablish that labor organization as a bargaining representative of its employees.

4. Whether, upon finding that petitioner, in violation of Section 8 (1) of the Act, had changed the regular day off of an employee from Sunday to Tuesday because of his union membership and activities, the Board properly required petitioner to restore to the employee the privilege of taking his regular day off on Sunday.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix to the petition at pages 21–22.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. I, 734–778). The facts found by the Board and shown by the evidence may be summarized as follows:[1]

In 1933, petitioner established a conventional Employees' Representation Plan which admittedly became illegal upon the passage of the Act in 1935; petitioner nevertheless continued to maintain and support the Plan until after the April 1937 decisions of this Court sustaining the Act[2] (R. I, 739, 766–767; R. I, 116–119, 121, 284–288, 343–345, 499–509). Concurrently, when Lodge 1029, Amalgamated Association of Iron, Steel and Tin Workers of North America, affiliated with the C. I. O., sought to organize petitioner's employees in the spring of 1937, petitioner's ranking officials repeatedly questioned the president of Lodge 1029 concerning that organization, stated that membership therein was inconsistent with loyalty to peti-

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

[2] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, and companion cases.

tioner, and otherwise indicated their opposition to the affiliation of petitioner's employees with outside organizations (R. I, 740–742; R. I, 123–130).

On April 16, 1937, petitioner's vice president, Swab, assembled the Plan representatives and announced that the Supreme Court decisions made it necessary to discontinue the Plan; in the same speech he stated that the representatives could "continue to meet with your own little organization as you are," that "We will judge the future by the past, and trust that the future will be the same as in the past," and that "it didn't make sense to him why men should want to pay, have to pay dues to work, for the right to work, and why we should have outsiders coming in telling us what to do," and otherwise expressed his displeasure with Lodge 1029 (R. I, 742–743, 767–768; R. I, 119–122, 551–552). The Board found that Swab's statements clearly revealed to the employees petitioner's desire for the continuance of an organization similar to the Plan (R. I, 768).

On May 30, 1937, because it had been unable to obtain a collective-bargaining agreement with petitioner, Lodge 1029 called a strike which lasted until July 9, 1937 (R. I, 743, 768; R. I, 130–132, 293–300, R. II, 7–12). During the strike, a group of employees including two former Plan representatives and a supervisory employee organized an inside union called the Valley Mould Independent Employees Union (R. I, 768–769; R. I, 437–439, 443–445, 589–591, 120, 327–328, 341). Petitioner's su-

pervisory staff meanwhile solicited strikers to abandon Lodge 1029 and return to work, threatening some with loss of their jobs unless they did so (R. I, 743–744, 769; R. I, 195, 227, 237–240, 243–244, 252, 273–274, 278–279, 324); organizers of the Independent also attempted to break the strike (R. I, 769–770; R. I, 304–305, 445–447). The strike was settled after petitioner posted a "statement of policy" concerning working conditions which recognized Lodge 1029 as the representative of its members (R. I, 754; R. I, 132, 510–512).

Shortly after the termination of the strike, petitioner changed the regular day off of Cook, the president of Lodge 1029, from Sunday to Tuesday, expressly because of his union membership and activities (R. I, 744–745; R. I, 137–138).

On March 23, 1938, after Lodge 1029 was selected by a majority of the employees in an election conducted by the Board pursuant to Section 9 of the Act on February 18, 1938, the Board certified Lodge 1029 as exclusive bargaining agent of petitioner's employees in an appropriate unit (R. I, 751–752; R. I, 135–137). During the critical period preceding the election, foremen supported the Independent and opposed Lodge 1029 by statements identifying petitioner's interests with those of the Independent (R. I, 770–771, 745–746; R. I, 254–255, 265–266, 279–280).

After the certification of Lodge 1029, petitioner met with it for collective bargaining purposes on seven occasions between April 22 and August 19,

1938; throughout the "negotiations," petitioner refused to recognize Lodge 1029 as the exclusive bargaining representative of petitioner's employees, and further evidenced its lack of good faith bargaining by its dilatory tactics, failure to submit genuine counterproposals, refusal to enter into a signed agreement, and insistence that any agreement reached must be conditioned on the posting of a $200,000 bond by Lodge 1029 (R. I, 754–765; R. I, 160–193, 518–551, 576–587, R. II, 15–21). The Independent grasped petitioner's refusal to bargain with Lodge 1029 as a selling point in obtaining members for itself (R. I, 771; R. I, 450–452); petitioner's supervisory staff concurrently disparaged and inveighed against Lodge 1029 (R. I, 746–750, 765; R. I, 139–141, 232–233, 261, 268–270). At the last bargaining conference between petitioner and Lodge 1029 on August 19, 1938, petitioner advised the Lodge that the Independent had presented evidence showing that it then represented a majority of the employees, and that petitioner therefore was meeting with Lodge 1029 as the representative of its members only (R. I, 752, 762–763; R. I, 186–188, 585–587).

Upon the foregoing evidentiary findings, the Board found that petitioner had interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, thus violating Section 8 (1) of the Act (R. I, 750–751, 772); had refused to bargain collectively with Lodge 1029 on each of the seven conference

dates and at all times thereafter, in violation of Section 8 (1) and (5) of the Act (R. I, 765–766, 772); and had dominated, interfered with, and supported the Independent in violation of Section 8 (1) and (2) of the Act (R. I, 772–773). The Board found further that any defections from Lodge 1029 to the Independent were the result of petitioner's unlawful refusals to bargain, and that designation by the employees of the company-dominated Independent did not represent the employees' free choice (R. I, 753, 764, 774).

The Board's order required petitioner to cease and desist from its unfair labor practices; to bargain collectively with Lodge 1029; to withdraw recognition from and disestablish the Independent; to restore to Cook his former privilege of taking his regular day off on Sundays; and to post notices (R. I, 776–778).

Thereafter, petitioner filed a petition in the court below to review and set aside the Board's order (R. I, 1–92). The Board answered, requesting enforcement of its order (R. I, 102–107). On December 17, 1940, the court handed down its opinion enforcing the Board's order, subject to the right of interested proper parties to seek a recertification and redetermination of the bargaining representative (R. II, 23–36). A petition for rehearing filed by petitioner (R. II, 39–47) was denied on January 31, 1941. On February 5, 1941, the court entered a decree in conformity with its opinion (R. II, 68–70).

ARGUMENT

1. Petitioner's primary contention is that it need not bargain with a representative of its employees, duly certified as such by the Board, where another organization (Independent) is said to have become the representative of a majority of its employees thereafter (Pet. 2–3, 12–15). However, it is clear that the question is not open for decision on this record, for the Board has found, and the court below agreed, that petitioner had dominated, interfered with, and supported Independent (R. I, 772–773, II, 32–36), with the consequence that Lodge 1029 has not in fact been supplanted by another organization which the Act recognizes as a representative of the employees. *National Labor Relations Board* v. *Bradford Dyeing Assn.*, 310 U. S. 318; *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; cf. *National Labor Relations Board* v. *Falk Corp.*, 308 U. S. 453.

Moreover, the Board found that petitioner had unlawfully refused to bargain collectively with Lodge 1029 at the several conferences preceding August 19, before there was any contention of a shift to Independent, and that the alleged subsequent shift to Independent was a product of those violations (R. I, 753, 764, 774). Although the court below did not find it necessary to pass upon these findings, they are nevertheless fully supported (Statement, *supra*, pp. 5–7), and constitute

an additional reason for the enforcement of the Board's order, regardless of petitioner's contention. *International Association of Machinists* v. *National Labor Relations Board, supra.*

It is thus apparent that the question which petitioner seeks to raise is not in issue in this case and that the decision therefore cannot be in conflict, as asserted by petitioner (Pet. 12–13), either with *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2), certiorari denied, 304 U. S. 576, 585, or with *National Labor Relations Board* v. *Whittier Mills Co.*, 111 F. (2d) 474 (C. C. A. 5). Moreover, even if the issue were squarely presented, there would not be any conflict. The foregoing decisions merely hold that a representative selected by a majority must be recognized until its status is changed. The court below accepted that result, but ruled that the change in status must be evidenced by a new certification before the employer can ignore the representative previously selected by a majority of the employees. The reference of the court below to the necessity of additional proceedings before the Board for change in certification merely recognizes the only orderly method of establishing the existence of a change in status. Indeed, that statement by the court below is squarely in accord with the *Remington Rand* decision in which the court said the employer "must invoke an inquiry by the Labor Board" if it believes that a labor organization formerly certified by the Board no longer rep-

resents a majority of the employees, before it can refuse to treat with it. 94 F. (2d), at 870.[3] There is nothing in the *Whittier Mills* case to the contrary.

2. Petitioner's next contention (Pet. 3–4, 16–18), that there is no substantial evidence to sustain the Board's findings that petitioner dominated, interfered with, and supported the Independent, presents no question of general importance. Moreover, the evidence reviewed in the Statement (*supra,* pp. 3–6) affords full support for the challenged findings. Nor is there any conflict, as petitioner asserts (Pet. 16–18), with *Humble Oil & Refining Co.* v. *National Labor Relations Board,* 113 F. (2d) 85 (C. C. A. 5); that decision turned, as does the present case, upon its particular facts.

3. Petitioner challenges next (Pet. 4, 18) the provisions of the Board's order directing petitioner to withdraw recognition from and completely disestablish the Independent as a bargaining representative of its employees. But the propriety of these provisions upon such findings as are here present, is well established. *National Labor Relations Board* v. *Link-Belt Co.,* Nos. 235, 236, this Term, and *H. J. Heinz Co.* v. *National Labor Relations*

[3] Cf. *Texas & New Orleans R. Co.* v. *Brotherhood of Railway Clerks*, 281 U. S. 548, 557, in which the decree approved by this Court required the carrier to recognize the Brotherhood until "by proper ballot" the employees selected another representative (24 F. (2d), at 434; 25 F. (2d), at 877–878).

Board, No. 73, this Term, both decided January 6, 1941; *National Labor Relations Board* v. *Falk Corp.,* 308 U. S. 453; *National Labor Relations Board* v. *Newport News Shipbuilding & Dry Dock Co.,* 308 U. S. 241; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261.

4. Petitioner's final contention (Pet. 4, 19), that the Board improperly ordered the restoration of Cook's former privilege of taking his regular day off on Sundays, is clearly without merit. Petitioner does not challenge the Board's findings and supporting evidence (R. I, 744–745; R. I, 137–138) upon which the order rests, i. e., that Cook was deprived of the Sunday privilege because of his union membership and activities, contrary to Section 8 (1) of the Act. The remedy directed by the Board simply "neutralizes" the illegal discrimination; it is precisely "adapted to the situation which calls for redress." *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348; *Phelps Dodge Corp.* v. *National Labor Relations Board,* Nos. 387, 641, this Term, decided April 28, 1941. Contrary to petitioner's assertion (Pet. 19), the order obviously does not deprive petitioner of managerial authority to make future changes in Cook's day off for nondiscriminatory reasons and on a nondiscriminatory basis; the order requires nothing more than that petitioner restore to Cook what it has discriminatorily taken from him.

CONCLUSION

The decision below is correct and does not present a conflict. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

ARNOLD RAUM,
Special Assistant to the Attorney General.

ROBERT B. WATTS,
General Counsel,

LAURENCE A. KNAPP,
Associate General Counsel,

MORRIS P. GLUSHIEN,

DAVID FINDLING,
Attorneys,
National Labor Relations Board.

MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941